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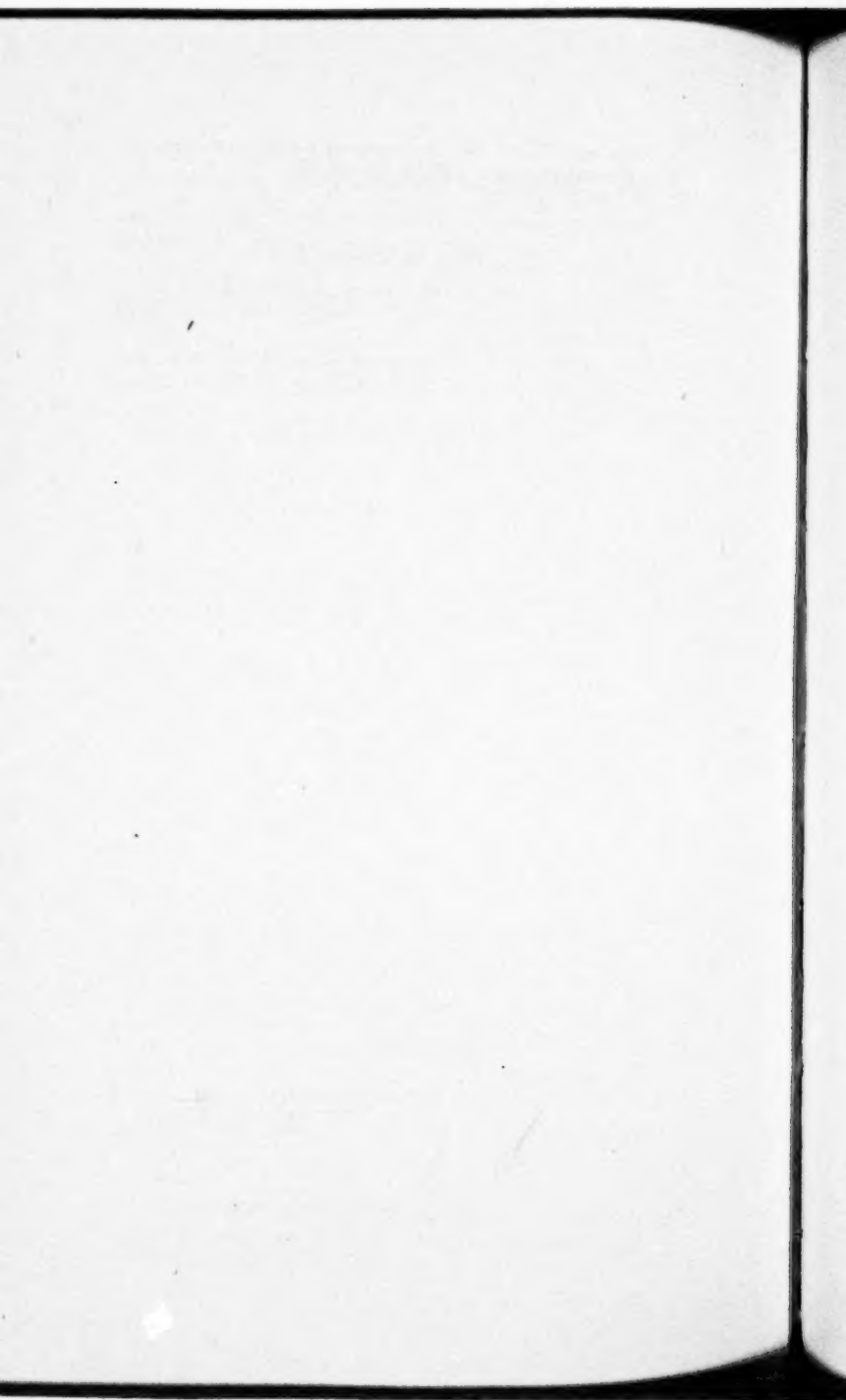
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# **In the Supreme Court of the United States**

OCTOBER TERM, 1948

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No. 332

THE UNITED STATES, PETITIONER

v.

EDMOND PFOTZER AND E. JOHN PFOTZER,  
CO-PARTNERS

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PETITION FOR A WRIT OF CERTIORARI TO THE  
COURT OF CLAIMS

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The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Claims, entered in the above-entitled case on May 3, 1948.

## **OPINION BELOW**

The opinion of the Court of Claims (R. 46-62) has not yet been reported.

## **JURISDICTION**

The judgment of the Court of Claims was entered on May 3, 1948 (R. 62). A motion for a new trial, seasonably filed, was denied on July 6,

1948 (R. 63). The jurisdiction of this Court is invoked under 28 U.S.C. 1255.

#### QUESTIONS PRESENTED

In May 1942, the War Department and a contractor entered into a standard-form construction contract, Article 15 of which required recourse to established administrative procedure for the final determination of disputes concerning questions of fact, and Article 1 of which incorporated a provision of the specifications requiring recourse to the same procedure for final determination of the "intent and meaning" of the "drawings and specifications." Disputes arose concerning the interpretation of the plans and specifications, which were adjudicated adversely to the contractor by the designated administrative officials, and the contractor brought suit in the Court of Claims. The questions presented are:

1. Whether the contractor has standing to challenge the validity of the specifications-interpretation provision or the authority of the contracting officer to include it in the contract.
2. Whether the specifications - interpretation provision is valid and authorized.
3. Whether the specifications - interpretation provision covers issues of interpretation involved in the determination of amounts due by the Government under the contract.

**CONTRACT PROVISIONS INVOLVED**

The pertinent portions of the contract and specifications are set forth in the Appendix, *infra*, pp. 28-29.

**STATEMENT**

In May, 1942, the United States (through the War Department's Corps of Engineers) entered into a contract with the respondents for the construction of housing and other facilities at Brookley Field, Mobile, Alabama. In this action, respondents asserted seven claims for additional compensation, under the contract, which had been rejected by the War Department. The Court of Claims denied recovery on four of these items and entered judgment against the United States on the remaining three claims. This petition raises the correctness of the lower court's rulings on two of the three claims decided against the Government. The pertinent facts, as found by the lower court, are as follows:

The bid submitted by respondents, after they had consulted the plans and specifications of the project (R. 24) in response to the War Department's invitation for bids, was accepted (R. 25, 26), and on May 14, 1942, the parties entered into a "Letter Contract" by which the United States placed an order for the work which "shall include all items incidental to the proper execution and completion of the work, ready for use, in strict accordance with specifications, schedules and drawings, all of which are made a part hereof \* \* \*" (R. 25).

The letter stated that "It is understood that this contract will be supplemented by the execution of a formal contract between you and the United States of America, following, in General, U. S. Standard Form No. 23, Revised \* \* \*" (R. 25). The formal contract, which both parties later executed, followed Standard Form No. 23 with certain additions and eliminations (R. 29-32). It contained the normal form of "Disputes" clause, Article 15, which entrusted to the contracting officer the settlement of "all disputes concerning questions of fact" and with a right of appeal from the contracting officer's decision to the head of the department (R. 14, 59-60, 63). Article 1 of the contract also incorporated by reference the "specifications, schedules, and drawings," which were designated by title <sup>1</sup> (R. 10-11, 29-30). Paragraph 1-07 of the incorporated specifications ("Interpretation of Contract") made the contracting officer the "interpreter" of "the true intent and meaning of the drawings and specifications" (R. 18, 60, 63-64); and Paragraph 1-08 of the specifications ("Claims, Protests and Appeals") gave the contractor an appeal to the Secretary of War, or his representative, from any action or ruling of the contracting officer which was deemed unfair, and made the Secretary's decision "final and binding upon the parties to the contract" (R. 18-19, 64). The two claims for additional compensation involved in this

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<sup>1</sup> The incorporation of "specifications, schedules, and drawings" is an integral part of U. S. Standard Form No. 23. See 41 C.F.R. 12.23, p. 1326.



petition were submitted to the contracting officer, who ruled against respondents (R. 24, 33, 35, 59), and his rulings were affirmed by the War Department Board of Contract Appeals, the Secretary's duly authorized representative, which held that respondents were not entitled to any further payments (R. 24, 33, 35, 59).

1. *Claim for \$3,217.80 for formed concrete beams* (R. 33-34, 51-53): The Bid Form (which was incorporated into the specifications, as the court below expressly held (R. 30-32, 34)) provided for lump sum payments for each of several types of buildings (*e. g.* administration, barracks, mess, warehouse) to be erected by respondents (R. 28),<sup>2</sup> and also contained a general unit price (\$30.00 per cubic yard) for pouring "Formed Concrete Foundations \* \* \* Concrete including reinforcement for all piers, foundation walls, bases under all piers and foundation walls and for floor slabs" (R. 27). In connection with the construction of the mess buildings, respondents poured a number of formed concrete *beams*, reinforced with steel rods, extending around

<sup>2</sup> A "Note" in the Bid Form provided, in this connection (R. 27):

"Unit price for each of the buildings listed hereinafter shall include all work, materials, labor and incidentals, to construct them complete with utilities to a point five (5) feet outside the building except for clearing and grubbing, excavation, gravel fill under the floor slabs, concrete and reinforcing steel in the piers, footings, foundation walls or floor slabs on earth or gravel. Concrete floor slabs including reinforcement not on earth or gravel shall be included in the lump sum price bid for each building."

the perimeter of the kitchen section of each of the buildings (R. 33). These beams rested on the concrete foundation piers, and were a minimum of 18 inches above the finished grade of the ground, and were formed and poured as a monolith with the floor slabs, which partly rested on the beams and were poured on wood sub-floors; the beams could as well, at the contractor's election, have been poured as a monolith with the concrete foundation piers (R. 33).

The beams were shown and called for on the foundation drawings but were apparently specifically referred to in the written specifications only in an irrelevant connection (R. 33-34).<sup>3</sup> Respondents interpreted the Bid Form and the drawings as intending the beams to be paid for at the general unit price for "Formed Concrete Foundations," and therefore did not include any amount for their cost in the lump sum price bid for the mess building (R. 33-34).

On presentation of respondents' claim for payment for this concrete work at the unit price of \$30 a cubic yard, the contracting officer held that the beams were part of the superstructure, and not the foundations, of the buildings, and that compensa-

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<sup>3</sup> Article 2 of the contract ("Specifications and drawings") provided, in part: "Anything mentioned in the specifications and not shown on the drawings, or shown on the drawings and not mentioned in the specifications, shall be of like effect as if shown or mentioned in both. In case of difference between drawings and specifications, the specifications shall govern" (R. 11).

tion therefor was included in the lump sum paid for each building. On appeal, the Board of Contract Appeals affirmed this ruling (R. 33).<sup>4</sup> Interpreting the Bid Form (which constituted a part of the specifications) and the drawings for itself, the Court of Claims held, with respondents, that the "contract intended that these formed reinforced concrete beams should be paid for at the unit price bid \* \* \* for 'Formed Concrete Foundations' " (R. 34, 51-53), awarded judgment on this item for \$3,217.80.

2. *Claim for \$2,018 for excavation and concrete floor slabs for wash racks* (R. 34-35, 53-54): The contract, through the Bid Form, called for two "Wash Rack, Mod. (25' x 60') (5-Car) (Excluding Booster Pump and connections)" at a total lump sum price of \$2,400 (R. 28). In performing this portion of the contract, respondents did a considerable amount of excavation and laid down a reinforced concrete floor slab for each wash rack (R. 34-35). Payment for this work, in addition to the designated lump sum price, was demanded under the general item for "Formed Concrete Foundations" (R. 27, 35) (quoted *supra*, p. 5) (for the floor slabs), and under the similar general unit price item for "Excavation for building foundations, footings and floor slabs (other than space grading indicated above)" (R. 27, 34) (for the excavation).

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<sup>4</sup>The Board of Contract Appeals' decision on this claim (BCA No. 292, December 15, 1943) is reported at 1 *Contract Cases Federal* (Commerce Clearing House) 931, at 933.

In addition to the excavation and floor slabs, the wash racks required, among other things, plumbing, water pipes and connections, fixtures and drains (R. 35). In making their bid, respondents did not include the cost of excavation in calculating their price of \$1,200 for each of the racks (R. 35). The above quoted provision in the Bid Form (which was incorporated in the specifications) was the only reference in the written contract or specifications specifically relating to the wash racks, but the racks were shown on one of the drawings<sup>5</sup> (R. 53). Respondents rested their claim for additional compensation on the wording of the various items, as quoted above; on the "Note" quoted in footnote 2, p. 5; and on "General Note" 1 in the Bid Form.<sup>6</sup> The claim was, however, denied by the contracting officer, and, on appeal, by the Board of Contract Appeals<sup>7</sup> (R. 35). The court below interpreted the specifications for itself, apparently without considering the pertinent drawing (which

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<sup>5</sup> See fn. 3, *supra*, p. 6.

<sup>6</sup> "Whenever units of measure, i.e. linear foot, cubic yard, square yards, and similar units of measure are mentioned in the unit price bids, it shall be interpreted to mean the unit of material installed in accordance with the plans and specifications and ready for use. Where items are paid for complete, complete in place, ready for use, or furnished and installed, all incidentals necessary to the proper operation or use of the item, such as excavation, backfill, equipment, assemblies, piping and connection to adjacent work shall be included in the unit price bid" (R. 28-29).

<sup>7</sup> The Board of Contract Appeals' decision (BCA No. 122, July 20, 1943) is reported at 1 *Contract Cases Federal* (Commerce Clearing House) 230, at 238-239 ("Claim for Payment for Wash Racks and Booster Pumps").

was not in evidence below, but which the Board of Contract Appeals had considered of prime significance), and held that the respondents were entitled to recover on this claim (R. 34-35, 53-54).

In the general portion of its opinion dealing with all of respondents' claims (R. 59-62), the Court of Claims held that Article 15 ("Disputes") did not apply to any of the contested items, including the two involved in this petition, because the issues were not of fact but of law (R. 59-60). It refused to apply, or be bound by, Paragraphs 1-07 and 1-08 of the specifications, regarding interpretation of the intent and meaning of the drawings and specifications (*infra*, pp. 28-29), because, in its view (a) the contracting agency had no authority to vary or add to Standard Form No. 23 by inserting these provisions in the specifications; (b) Standard Form No. 23 required all changes or alterations to be noted in a certain formal manner, and no such notation was made here; and (c) in any case, Paragraphs 1-07 and 1-08 do not mean that the administrative interpretation of the plans and specifications is to be final with respect to questions of "amounts due" under the contract (R. 60-62). Accordingly, the court interpreted the plans, drawings, and specifications for itself in adjudging that respondents' claims were valid.

Judgment was entered against the United States for \$6,085.80 on the three claims on which respondents were successful (R. 62, 63). Of that sum, \$5,-

235.80 represents the recovery on the two claims involved here (R. 53, 54).

**SPECIFICATION OF ERRORS TO BE URGED**

The Court of Claims erred:

1. In rejecting, in connection with Item 2 ("Claim for \$3,217.80 for formed concrete beams") and Item 3 ("Claim for \$2,018 for excavation and concrete floor slabs for wash racks"), the administrative interpretations by the contracting officer and the Board of Contract Appeals of the drawings, plans, and specifications pertinent to those claims, and in independently interpreting those drawings, plans, and specifications without regard to those administrative interpretations.

2. In failing to give finality to the administrative interpretations of the pertinent drawings, plans, and specifications, as required by Paragraphs 1-07 and 1-08 of the specifications.

3. In holding that it could properly review the administrative interpretations and could substitute its own interpretations of the pertinent plans, drawings and specifications for those of the contracting officer and the Board of Contract Appeals.

4. In holding that Paragraphs 1-07 and 1-08 of the specifications were not intended to make the decision of the contracting officer and the Secretary of War (or his representative) final and conclusive on all issues of the interpretation of the drawings,

plans and specifications, including issues of interpretations involved in questions of amounts due by the Government under the contract.

5. In holding that a contrary construction of Paragraphs 1-07 and 1-08 would make those provisions illegal or unauthorized, and subject to be disregarded by the Court of Claims.

6. In holding that it was beyond the competence of the parties to confer authority upon the contracting officer and the Secretary of War (or his representative) to make final and conclusive rulings on questions of interpretation of the specifications, plans, and drawings.

7. In entering judgment for respondents on "Claim 2" for "Formed Concrete Beams, \$3,-217.80" and on "Claim 3" for "Excavation Performed and Concrete Floor Slabs Placed for Wash Racks, \$2,018."

#### REASONS FOR GRANTING THE WRIT

The Court of Claims has once again refused to apply the established provisions of government construction contracts, long accepted by contractors, which designate certain contractual disputes for administrative settlement.<sup>8</sup> In this latest of a

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<sup>8</sup> In less than a decade, the Government has felt it necessary to bring to this Court five other decisions of the Court of Claims inadequately recognizing the right of the United States to provide by contract for the administrative settlement of disputes arising under its construction contracts. See petitions for writs of certiorari in *United States v. John McShain, Inc.*, No. 43, Oct. T., 1939, pp. 6, 8-9 (reversed *per curiam*, 308 U. S.



series of restrictive holdings in this field, each contrary to the principles announced in this Court's controlling decisions, the court below has ignored the traditional clause providing for administrative interpretation of the plans, drawings, and specifications—used for years in thousands of contracts and often applied by the courts—on the novel ground that the contracting officer was not authorized to insert such a provision in the contract. As in the case of its predecessors in the series, this palpably erroneous decision requires correction by this Court.

1. In the first place, even if the contracting officer were without authority under the regulations to include the disputed provision in the specifications, the contractor would have no standing to challenge that clause. Before bidding upon the project, respondents were furnished with copies of the specifications containing paragraphs 1-07 ("Interpretation of Contract") and 1-08 ("Claims, Protests and Appeals") (R. 24). The "Letter Contract" accepted by them on May 15, 1942 expressly incorporated the specifications (R. 25). The formal contract, later executed by both

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512, 520; *United States v. Callahan-Walker Constr. Co.*, No. 65, Oct. T., 1942, pp. 8-12 (reversed 317 U. S. 56); *United States v. Blair*, No. 75, Oct. T., 1943, pp. 18-19 (reversed 321 U. S. 730); *United States v. Beuttas*, No. 431, Oct. T., 1944, pp. 7-8 (reversed 324 U. S. 768); *United States v. Joseph A. Holpuch Co.*, Nos. 696 and 697, Oct. T., 1945, pp. 17-18 (reversed 328 U. S. 234).



parties, likewise made the pertinent specifications "a part" of the contract (R. 30). The very provisions now attacked as invalid were thus made known to respondents at the earliest possible time, and were voluntarily accepted and agreed to by them, without any protest so far as we are aware. In addition, after the dispute arose, respondents made full use of the review mechanism of paragraph 1-08 (*supra*, pp. 7, 8) to procure appellate decisions by the War Department's Board of Contract Appeals.<sup>9</sup> Basic contract law teaches that a contractor freely agreeing to, and making use of, a contract term cannot later repudiate it when it works to his disadvantage; and there is nothing in the nature of Government contracts which grants such a special privilege to contractors who would clearly have no similar right in their private dealings. Cf. *Perkins v. Lukens Steel Co.*, 310 U. S. 113, 127, 129-130; *United States v. Standard Rice Co.*, 323 U. S. 106, 111; *Priebe & Sons, Inc. v. United States*, 332 U. S. 407, 411.

The Court of Claims has, however, erroneously found a reason for granting respondents a unique status, in the asserted absence of authority to "deviate" from the terms of the standard form construction contract issued by the Treasury's

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<sup>9</sup> On some issues (not involved here) involving interpretation of the plans and specifications, the Board of Contract Appeals upheld respondents rather than the contracting officer. See 1 *Contract Cases Federal* (Commerce Clearing House) 230, at 235-7, 239, 241-2 (*supra*, fn. 7, p. 8).

Procurement Division (R. 60-62).<sup>10</sup> But established doctrine flatly denies that a contractor receives any private right from such a failure of the contracting officer to stay within the bounds of his contractual power. "Like private individuals and businesses, the Government enjoys the unrestricted power \* \* \* to fix the terms and conditions upon which it will make needed purchases"; and "the Government may for the purpose of keeping its own house in order lay down guide posts by which its agents are to proceed in the procurement of supplies, *and which create duties to the Government alone.*" *Perkins v. Lukens Steel Co.*, 310 U. S. at 127 [italics supplied]. The standardization of government contract forms, and the centralization of federal procurement policy in the Treasury Department in 1933, was not undertaken to confer private rights on government contractors, but to promote the uniformity and efficiency of government contracting, as the terms of the authorizing Reorganization Act make clear.<sup>11</sup> If the Procurement Division's direction of uniformity was violated in this instance,

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<sup>10</sup> By Section 1 of Executive Order No. 6166, June 10, 1933 (note following 5 U.S.C. 132), the Procurement Division of the Treasury Department (now called the Bureau of Federal Supply, 11 Fed. Reg. 13638) was authorized to supervise procurement throughout the Federal Government and to require use of approved contract forms. 41 C.F.R. 1.1—1.2, 11.1—11.3. U. S. Standard Form No. 23 ("Construction") was promulgated under this authority, and was to be used "for every formal contract for the construction or repair of public buildings or works." 41 C.F.R. 12.23, p. 1332.

<sup>11</sup> Executive Order No. 6166 was issued under Title IV ("Reorganization of Executive Departments") of the Legislative Appropriation Act for the fiscal year 1933 (Act of June 30, 1932, c. 314, 47 Stat. 382, 413-415), as amended by Section 16

the matter is one of internal housekeeping, appropriate for correction by superior executive or administrative authorities. The provisions of the contract, freely entered into by respondent, are not thereby rendered unenforceable against the private contractor.<sup>12</sup> In this respect, the Procurement Division's requirements are in precisely the same class of Government-oriented internal regulations as the Public Contracts Act (*Perkins v. Lukens Steel Co.*, 310 U. S. at 127-9), the statute directing Government contracts to be in writing (*United States v. New York and Porto Rico Steamship Co.*, 239 U. S. 88, 92), and the advertising-and-low-bidder legislation (*American Smelting & Refining Co. v. United States*, 259 U. S. 75, 78; *Perkins v. Lukens Steel Co.*, 310 U. S. at 126)—all of which have been held by this Court not to confer any

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of the Treasury and Post-Office Department Appropriation Act of March 3, 1933 (c. 212, 47 Stat. 1489, 1517-1519), and Title III of the Act of March 20, 1933, c. 3, 48 Stat. 8, 16. These statutes empowered the President to reorganize executive agencies and functions in order "to reduce expenditures \* \* \*," "to increase the efficiency of the operations of the Government \* \* \*," "to reduce the number of [executive] agencies," "to eliminate overlapping and duplication of effort," and to "group, coordinate, and consolidate executive and administrative agencies of the Government \* \* \* according to major purposes." 47 Stat. 1517. See also Bureau of the Budget Circular No. 47 (November 22, 1921), reprinted in *Harwood-Nebel Construction Co., Inc., v. United States*, 105 C. Cls. 116, 129-130.

<sup>12</sup> The question at issue concerns only the alleged deviation by the contracting officer in inserting paragraph 1-07 of the specifications into the contract, contrary, it is said, to the applicable regulations. There is no doubt that the inclusion of such a provision could lawfully be authorized by the proper agency of the Government, and it in nowise infringes on the judicial power. This Court and the Court of Claims have frequently upheld such clauses. See *infra*, p. 16.

justiciable rights on contractors or would-be contractors.

2. The court below erred even more seriously in holding that the contracting officer had no authority to incorporate the disputed clauses (paragraphs 1-07 and 1-08 of the specifications) in the contract. Neither general law, nor the Procurement Division's regulations, nor the terms of Standard Form No. 23, barred the use of these provisions, during either time of peace or war.

a. Courts throughout the country—this Court, the Court of Claims, and other tribunals—have long upheld, as properly includible in construction contracts, clauses giving the power of final interpretation of plans and specifications to designated officials.<sup>13</sup> As the multitude of cases shows, such provisions have had wide usage for many years, both in Government and in private agreements.<sup>14</sup> The lower court neither suggests any change in the

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<sup>13</sup> *E.g.*, *Merrill-Ruckgaber Co. v. United States*, 241 U. S. 387, 388, 393; *United States v. John McShain, Inc.*, 308 U. S. 512, 520; *B-W Construction Co. v. United States*, 101 C. Cls. 748, 768 (reversed on other points *sub nom. United States v. Beuttas*, 324 U. S. 768); *Langevin v. United States*, 100 C. Cls. 15, 40-41; *McCloskey & Co. v. United States*, 103 C. Cls. 254; *Union Paving Co. v. United States*, 107 C. Cls. 405, 417; *United States v. Madsen Const. Co.*, 139 F. 2d 613, 614, 616 (C.C.A. 6); *English Const. Co., Inc. v. United States*, 43 F. Supp. 313 (D. Del.); *Tobin Quarries, Inc. v. Central Nebraska Public Power & Irr. Dist.*, 64 F. Supp. 200, 208-210 (D. Neb.), affirmed, 157 F. 2d 482 (C.C.A. 8), and state and federal decisions there cited.

<sup>14</sup> See cases cited and referred to in fn. 13, *supra*, and also *infra*, p. 19.

settled judicial law on the point of ultimate power to contract for this type of clause, nor that any statute now requires a different decision, but it does hold that, at least since the establishment of centralized procurement in 1933, authority has been withdrawn by the Treasury's Procurement Division from government contracting agents to insert these provisions in government construction contracts. The court points to the "Disputes" clause of the standard form (Article 15) (R. 60, 63), which deals with "questions of fact,"<sup>15</sup> and founds its invalidation of paragraph 1-07 upon the "Directions for Preparation of Contract," attached to Form No. 23 (R. 61, 64-65; 41 C.F.R. 12.23, p. 1332-2), which state: "There shall be no deviation from this standard contract form, except as provided for in these directions, and except as authorized by the Director of Procurement" and "Additional contract provisions and instructions, deemed necessary for the particular work, not inconsistent with the standard form nor involving questions of policy, may be incorporated in the specifications or

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<sup>15</sup> Article 15 ("Disputes") of U. S. Standard Form No. 23, which is limited to questions of fact, was involved in *United States v. Callahan-Walker Constr. Co.*, 317 U. S. 56, 58. Article 15 ("Disputes") of U. S. Government Form P.W.A. 51, which form was extensively utilized on government construction contracts between 1933 and 1940, is not so limited and provides for administrative settlement of "all" disputes concerning questions arising under the contract. This was the form considered by this Court in *United States v. John McShain, Inc.*, 308 U. S. 512, 520; *United States v. Blair*, 321 U. S. 730; *United States v. Beuttas*, 324 U. S. 768, and *United States v. Joseph A. Holpuch Co.*, 328 U. S. 234.

other accompanying papers." The short answer to this surprise charge of improper deviation is that none exists, and that neither courts, Government agencies, nor contractors have hitherto surmised any inconsistency. Article 15 is limited to disputes concerning issues of "fact," and does not imply that other disputes cannot be handled similarly, if the parties so agree; the opening phrase ("Except as otherwise specifically provided in this contract") itself indicates room for additional provisions regarding contractual disputes to be incorporated in the agreement. The inclusion of a provision extending administrative settlement to issues of interpretation of the drawings and specifications cannot, therefore, be a deviation from, or inconsistent with, Article 15, which stands unchanged and fully effective. To the contrary, the close affinity, in construction matters, between the expertise and judgment required to determine strictly "factual" issues and that needed to solve problems of the interpretation of plans and specifications has led some Government contracting agencies to insist, perhaps correctly, that Article 15 itself covers the latter, without need for a supplementary clause like paragraph 1-07. Cf. *United States v. Callahan-Walker Constr. Co.*, 317 U. S. 56 ("equitable adjustment" required by change order a "question of fact").<sup>16</sup>

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<sup>16</sup> The Court of Claims has, however, ruled consistently, in recent years, that interpretation of plans and specifications does not come under Article 15 of Standard Form No. 23. *Davis v. United States*, 82 C. Cls. 334, 346-7; *Callahan Con-*

Nor, at the time this contract was made, did the challenged clauses of the specifications involve a new "question of policy," upon which the specific ruling of the Procurement Division was necessary. By 1942, the policy had long been established. Provisions substantially identical with paragraph 1-07 have been used in numerous government construction contracts for at least thirty-five years, and are now regarded as "common."<sup>17</sup> The widespread use of the clause is proved most simply by a survey of the Government contract cases in this Court and the lower courts.<sup>18</sup> This conclusion is con-

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*struction Co. v. United States*, 91 C. Cls. 538, 616-7; *Schmoll v. United States*, 91 C. Cls. 1, 33; *John McShain, Inc. v. United States*, 88 C. Cls. 284, 296-7 (reversed, 308 U. S. 512, 520); *B-W Construction Co. v. United States*, 97 C. Cls. 92, 118; *Gerhardt F. Meyne v. United States*, C. Cls. No. 45926, decided April 5, 1948; *Orino v. United States*, C. Cls. No. 46063, decided June 1, 1948; instant opinion, R. 62.

<sup>17</sup> Anderson, *The Disputes Article in Government Contracts* (1945) 44 Mich. L. Rev. 211, 215, 238-239; *B-W Constr. Co. v. United States*, 101 C. Cls. 748, 768 ("It is true that it is not uncommon in construction contracts for the parties to agree that the decision of the architect or engineer shall be final on such questions as the proper interpretation of the plans and specifications . . .").

<sup>18</sup> The cases in this Court in which it clearly appears that the contract contained such a provision are: *Merrill-Ruckgaber Co. v. United States*, 241 U. S. 387, 388, 393 (1916); *United States v. John McShain, Inc.*, 308 U. S. 512, 520 (1939); *United States v. Joseph A. Holpuch Co.*, 328 U. S. 234, 237 (1946). Recent cases in the lower federal courts are: *Fred R. Comb Co. v. United States*, 100 C. Cls. 259, 260; *King v. United States*, 100 C. Cls. 475, 482; *Fleisher Eng. & Constr. Co. v. United States*, 98 C. Cls. 139, 141; *Langevin v. United States*, 100 C. Cls. 15, 26; *McCloskey & Co. v. United States*, 103 C. Cls. 254; *Union Paving Co. v. United States*, 107 C. Cls. 405, 413, 417, 422; *United States v. Madsen Constr. Co.*, 139 F. 2d 613, 614 (C.C.A. 6); *English Constr. Co. v. United States*, 43 F. Supp. 313 (D. Del.).



firmed by a hasty search through the Government's construction-contract records back to 1920, which reveal that the clause has been used by various government bureaus doing construction work, and consistently by the main such agency, Public Buildings Administration and its predecessors.<sup>19</sup> Specifically, similar provisions were widely used in general construction specifications, both before the adoption of Standard Form No. 23 in 1926 and thereafter, including the fifteen-year period since the Procurement Division was granted authority to require the use of standard forms (see fn. 10, *supra*, p. 14). The Procurement Division has been cognizant of, and has always regarded, the inclusion of such a clause together with Standard Form No.

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<sup>19</sup> The old Office of the Supervising Architect included in its "General Conditions" a provision that "The decision of the Supervising Architect as to the proper interpretation of the drawings and specifications shall be final," or, later (*e.g.* 1932), that "The decision of the Contracting Officer or his duly authorized representative as to the proper interpretation of the drawings and specifications shall be final." By Executive Order No. 6166, June 10, 1933 (*supra*, p. 14, fn. 10), the Office of the Supervising Architect was transferred to the newly-created Procurement Division of the Treasury Department. The same clause was used by the Public Buildings Branch of the Procurement Division (successor to the Office of the Supervising Architect). By Reorganization Plan No. 1, effective July 1, 1939, 53 Stat. 1423 (note following 5 U.S.C. 133t), the Public Buildings Branch was transferred to the Federal Works Agency, and became known as Public Buildings Administration. That Administration has at all times retained the clause in the "General Conditions" to its construction contracts, and employs it currently.

In addition, the cases cited above (fn. 18), indicate that a similar clause has been used by many other government agencies, including the War Department, the Bureau of Indian Affairs, the Department of the Interior, Public Works Administration, and the Civil Aeronautics Administration.



23 as wholly unexceptionable. This is shown most vividly by the fact that the Procurement Division's own Public Buildings Branch made use of the combination from 1933 to 1939, and that since its transfer in that year, the Public Buildings Administration, the chief government construction agency, has uniformly employed a "proper interpretation" clause in the General Conditions of its specifications. Long-established administrative practice of this strength compels the conclusion that the disputed paragraph cannot be viewed as a deviation from, or inconsistent with, the standard form, or as involving an unsettled matter of policy. Cf. *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 315.<sup>20</sup>

Not only is the instant decision in conflict with the settled practice, and unsupported by the terms of Standard Form No. 23, but it constitutes a com-

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<sup>20</sup> Even if paragraph 1-07 be regarded as a deviation from, or inconsistent with, Article 15, the established practice of fifteen years indicates tacit authorization by the Director of Procurement (as he then was).

The lower court's observation that no notation was made under the "Alterations" article of the standard form (R. 60-61) is obviously far wide of the mark. The "Alterations" article refers only to "changes . . . made in this contract before it was signed by the parties hereto" (R. 65), and no relevant changes "in this contract" were made. Article 15 was not altered in any way, and no reference had to be made to the addition of paragraphs 1-07 and 1-08 of the specifications since Article 1 of the standard form specifically made the specifications "a part" of the contract (R. 30; 41 C.F.R. 12.23, p. 1326). It is clear from the Article 22 ("Alterations") contained in respondent's contract that that provision was used only to note actual deletions from, or changes in, the standard form and the specifications submitted with the invitation (R. 65-66).

plete *volte face* from recent decisions of the Court of Claims on all fours with this one.<sup>21</sup> In *Langevin v. United States*, 100 C. Cls. 15, 25-26, 40-41 (1943), the standard form was used, with the normal Article 15, and the specifications contained a clause akin to paragraph 1-07; the court below did not hesitate to recognize and apply the latter provision. *McCloskey & Co. v. United States*, 103 C. Cls. 254, 255-256, 264-265 (1945), involving a similar coupling of disputes provisions, expressly rested on the "proper interpretation" clause in holding that the plaintiff could not recover for certain back counters in a government cafeteria which it claimed were not called for by the plans and specifications, but which the contracting officer required to be built. And in *Union Paving Co. v. United States*, 107 C. Cls. 405, 408-409, 417 (1946); with similar contract and specifications, the court relied on the interpretation provision in the specifications in holding that the contractor could not recover for having to use more concrete than it believed was called for by the specifications. Not only the novelty but the error of the instant opinion are underscored by these prior decisions of the Court of Claims itself.

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<sup>21</sup> We do not stress a conflict with *United States v. John McShain, Inc.*, 308 U. S. 512, 520, and *United States v. Joseph A. Holpuch Co.*, 328 U. S. 234, because Standard Form No. 23 was not used in those cases, and Article 15 ("Disputes") was not limited to questions of fact. See fn. 15, *supra*, p. 17. The present significance of those cases rests on the fact that they demonstrate that there is no overall executive, legislative or judicial policy opposed to provisions according finality to administrative decisions of the character here involved.

b. In any event, during World War II, the War Department (the contracting agency here) was freed by Title II of the First War Powers Act (Act of December 18, 1941, c. 593, 55 Stat. 838, 839, 50 U.S.C. App. 611) and by Executive Order No. 9001 (3 C.F.R., 1941 Supp., pp. 330-332, December 27, 1941) from the requirement of using the Procurement Division's standard forms. The statute authorized the President to permit the war agencies "to enter into contracts and into amendments or modifications of contracts \* \* \* without regard to the provisions of law relating to the making, performance, amendment, or modification of contracts \* \* \*," and the Executive Order delegated this power to the War Department, expressly authorizing "agreements of all kinds". As the Attorney General said in a classic opinion on the Act and Order (40 Op. Atty. Gen. No. 53, August 29, 1942, pp. 4, 6), "the grant is without any limitation whatever" (save certain specific exceptions not now relevant), and surely permitted the disregard of legislation and executive directions concerning the distribution of procurement functions within the Government.<sup>22</sup> During the active life of Title II of the First War Powers Act, the War Department

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<sup>22</sup> The Attorney General's opinion specifically mentioned (pp. 4, 6), as among the statutes which could be superseded, the Act of February 27, 1929, 45 Stat. 1341, 41 U.S.C. 7a-7d, centralizing government purchasing in the Treasury Department. This is one of the two main acts under which the Procurement Division (now the Bureau of Federal Supply) has operated. See Note following 41 U.S.C. 7. The other statute is the Act of June 17, 1910, 36 Stat. 531, 41 U.S.C. 7.

did not consider itself bound to use the peacetime standard forms, and as a matter of practice frequently departed from the terms of the Procurement Division's contracts, or instituted new forms, without seeking or securing any authorization from the peacetime promulgating agency.<sup>23</sup> Thousands upon thousands of war contracts were made which did not comply with the Treasury's regulations. The Procurement Division accepted the Attorney General's and the war agencies' views as to the scope of the First War Powers Act, and the Comptroller General did not object to the use of non-standard forms.<sup>24</sup> It follows that the lower court's views as to the limits of a contracting officer's authority to use the Procurement Division's standard forms are wholly irrelevant and incorrect as to all wartime agreements entered into by the many agencies endowed with power under Title II of the First War Powers Act.

3. The Court of Claims' secondary reason for ignoring paragraph 1-07 is, apparently, that the

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<sup>23</sup> The War Department issued an entire series of its own standard form contracts. See e.g., War Department Procurement Regulations, pars. 304, 1301-1325, 10 C.F.R. Cum. Supp. 81.304, 81.1301-81.1325. Cf. Fain and Watt, *War Procurement—A New Pattern for Contracts* (1944) 44 Col. L. Rev. 127.

<sup>24</sup> A memorandum recently submitted by the Bureau of Federal Supply to a Senate Committee states that after enactment of the First War Powers Act "the Military Establishment enjoyed for war purposes a complete exemption from all authority of the Bureau of Federal Supply with respect to procurement." Hearings before the Senate Committee on Expenditures in the Executive Departments, 80th Cong., 2d sess. on the proposed Federal Property Act of 1948, p. 129.

clause was not designed to apply to matters of "amounts due," but was an interim device requiring the contractor to accept the administrative interpretation during performance but leaving him entirely free to contest it after completion (R. 61-62). Paragraph 1-07 ("Interpretation of Contract"), however, flatly makes the contracting officer the "interpreter" of the "intent and meaning" of the "drawings and specifications", without qualification as to time or purpose, and paragraph 1-08 provides for an appeal from an adverse interpretation to a tribunal whose decision "shall be final and binding upon the parties to the contract." The lower court's peculiarly strained construction is also denied by the long practice under clauses such as these, both in government and in private contracts, which appears never to have doubted that the arbiter's interpretation is final for all purposes.<sup>25</sup> In addition, this Court and the Court of Claims in its prior decisions have always accepted clauses of this type as meaning precisely what they say, in cases directly involving questions of contract price or "amounts due." *Merrill-Ruckgaber Co. v. United States*, 241 U. S. 387, 392-393; *United States v. John McShain, Inc.*, 308 U.S. 512, 520; *United States v. Joseph A. Holpuch Co.*, 328 U. S. 234; *Langevin v. United States*, 100 C. Cls. 15, 39-41; *McCloskey & Co. v. United States*, 103 C. Cls. 254;

<sup>25</sup> See *supra*, p. 16, especially the collection of cases in *Tobin Quarries, Inc. v. Central Nebraska Public Power & Irr. Dist.*, 64 F. Supp. 200, 208-210 (D. Nebr.).

*Union Paving Co. v. United States*, 107 C. Cls. 405, 417.<sup>26</sup>

4. This decision of the Court of Claims, substantially destroying the effectiveness of the commonly-used "proper interpretation" clause, will operate, in a very large and significant class of cases, to deprive the Government "of the benefits of the administrative machinery it has created to adjudicate disputes and to avoid large damage claims." *United States v. Blair*, 321 U.S. 730, 735. As we have indicated (*supra*, pp. 19-21), provisions similar to paragraph 1-07 have for years been used in government construction contracts by many agencies, and are currently being included in numbers of agreements. Unless the instant decision is reviewed and corrected, all vitality will be drawn from hundreds of such clauses contained in contracts still outstanding or subject to litigation. The proper functioning of government procurement will also be seriously impeded by two other important aspects of the decision: (a) by permitting contractors who consent to certain contractual provisions later to attack the contracting officer's author-

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<sup>26</sup> The Court of Claims implicitly admits that its decisions on Claims 2 and 3 necessarily involved interpretations of the drawings and specifications (R. 59-62). The court's findings and opinion make this indisputable (R. 33-35, 51-54). See *supra*, pp. 5-9. There is some slight suggestion that the administrative interpretations were arbitrary (R. 34), but the court does not actually go on that ground (R. 33-35, 51-54, 59-62); and, in any case, a reading of the pertinent decisions of the Board of Contract Appeals (*supra*, pp. 7, 8, fn. 4, 7), together with the opinion below, demonstrates that the administrative determinations were entirely reasonable.

ity, the lower court opens the door for contractors to escape from distasteful clauses by first accepting and then disavowing them, and (b) by making it hazardous to forecast whether a particular added clause, no matter how ancient or useful, will be enforced in the Court of Claims, the decision below severely limits the freedom of government agencies to supplement the terms of standard form contracts. We do not hesitate, therefore, once again to petition this Court for relief from a decision by the Court of Claims nullifying an important and established clause in government contracts on the thinnest of grounds.

#### CONCLUSION

For the reasons stated, it is respectfully submitted that this petition should be granted.

PHILIP B. PERLMAN,  
*Solicitor General.*

OCTOBER 1948.



## APPENDIX

Article 15 of the Contract provides:

*Disputes.*—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto. In the meantime the contractor shall diligently proceed with the work as directed.

Paragraphs 1-07 and 1-08 of the specifications provide:

1-07. *Interpretation of Contract.*—Unless otherwise specifically set forth, the Contractor shall furnish all materials, plant, supplies, equipment, labor, etc., necessary to complete the work according to the true intent and meaning of the drawings and specifications, of which intent and meaning the Contracting Officer shall be the interpreter. Except when otherwise indicated, no local terms or classifications will be considered in the interpretation of the contract or the specifications forming a part thereof.

1-08. *Claims, Protests and Appeals.*—If the Contractor considers any work demanded of him to be outside the requirements of the contract or if he considers any action or ruling of the Contracting Officer or of the inspectors



to be unfair, the Contractor shall without undue delay, upon such demand, action, or ruling, submit his protest thereto in writing to the Contracting Officer, stating clearly and in detail the basis of his objections. The Contracting Officer shall thereupon promptly investigate the complaint and furnish the Contractor his decision, in writing, thereon. If the Contractor is not satisfied with the decision of the Contracting Officer, he may, within thirty days, appeal in writing to the Secretary of War, whose decision or that of his duly authorized representative shall be final and binding upon the parties to the contract. Except for such protests or objections as are made of record in the manner herein specified and within the time limit stated, the records, rulings instructions or decisions of the Contracting Officer shall be final and conclusive. All appeals from decisions of the Contracting Officer authorized under the contract shall be addressed to the Secretary of War, Washington, D. C. The appeal shall contain all the facts or circumstances upon which the Contractor bases his claim for relief and should be presented to the Contracting Officer for transmittal within the time provided therefor in the contract.